Supreme Court, U.S.
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No. 01-1033

In The

Supreme Court of the United States

ANITA D. BORLAWSKY,

Petitioner,

v.

TOWN OF WINDHAM, R. MICHAEL DENBOW, SCOTT LOSCIUTO and JANETTE LOSCIUTO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment to the Constitution requires a police officer to test all defenses to a crime before effecting an arrest if the officer has sufficient information to conclude that a crime has been committed or is being committed?

2. Whether the Petitioner has articulated sufficient grounds for review of the lower courts' decisions relative to alleged use of force?

3. Whether Federal Rule of Civil Procedure 52(a) requires findings of fact in resolving a motion for summary judgment?

4. Whether the United States District Court for the District of Maine or the United States Court of Appeals for the First Circuit departed from the accepted and usual course of judicial proceedings?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

WINDHAM RESPONDENTS' BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 2

REASONS FOR DENIAL OF THE WRIT 8

I. THE FEDERAL COURTS HAVE CONSISTENTLY REJECTED THE NOTION THAT THE FOURTH AMENDMENT REQUIRES A LAW ENFORCEMENT OFFICER TO TEST THE VIABILITY OF A SUSPECT'S DEFENSES WHEN THE OFFICER HAS A REASONABLE BELIEF THAT A CRIME HAS OCCURRED OR IS OCCURRING 8

II. THE PETITIONER HAS NOT IDENTIFIED A BASIS FOR THIS COURT TO REVIEW THE LOWER COURTS' HOLDING WITH REGARD TO USE OF FORCE 13

III. FINDINGS OF FACT ARE NOT REQUIRED IN RULINGS ON MOTIONS FOR SUMMARY JUDGMENT 15

IV. THERE WERE NO IRREGULARITIES IN THE PROCEDURES BELOW TO JUSTIFY REVIEW BY THIS COURT..... 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999) 13

Alexis v. McDonald's Restaurants of Massachusetts, Inc., 67 F.3d 341 (1st Cir. 1995) 9, 14

Baker v. McCollan, 443 U.S. 137 (1979).....11, 12, 15

Betances v. Sea-Land Servs., Inc., 248 F.3d 40 (1st Cir. 2001) 2

Brodnicki v. City of Omaha, 75 F.3d 1261 (8th Cir. 1996).....9, 12

Chambers v. Maroney, 399 U.S. 42 (1970) 8, 9, 11

Graham v. Connor, 490 U.S. 386 (1989).....14, 15

Grimm v. Churchill, 932 F.2d 674 (7th Cir. 1991)....9, 13

Illinois v. Gates, 462 U.S. 213 (1983) 10, 11, 12, 14

J.B. v. Washington County, 127 F.3d 919 (10th Cir. 1997).....9, 13

Jenness v. Nickerson, 637 A.2d 1152 (Me. 1994)..... 14

Klein v. Long, 2001 U.S. App. LEXIS 26990 (6th Cir.)..... 12

Lawton v. State Mut. Life Assurance Co., 101 F.3d 218 (1st Cir. 1996)..... 16

Maryland v. Macon, 472 U.S. 463 (1985)..... 9

Rankin v. Evans, 133 F.3d 1425 (11th Cir. 1998) 13

Ricciuti v. New York City Transit Authority, 124 F.3d 123 (2nd Cir. 1997) 12

Rivera v. Murphy, 979 F.2d 259 (1st Cir. 1992)..... 10

TABLE OF AUTHORITIES – Continued

Page

Ross v. Moffitt, 417 U.S. 600 (1974) 14

Torchinsky v. Siwinski, 942 F.2d 257 (4th Cir. 1991) 12

United States v. Bonilla Romero, 836 F.2d 39 (1st Cir. 1988) 11

United States v. Zannino, 895 F.2d 1 (1st Cir. 1990) 14

RULES

Federal Rule of Civil Procedure 52(a) 15

WINDHAM RESPONDENTS' BRIEF IN OPPOSITION

Respondents Officer R. Michael Denbow and the Town of Windham ("the Windham Respondents") respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the Judgment of the United States Court of Appeals for the First Circuit ("the First Circuit") issued on July 6, 2001 affirming the Order of the United States District Court for the District of Maine ("the District Court") dated September 26, 2000, which are reproduced in the Appendix to the Petition at pages 34 and 23, respectively. The Petitioner has failed to generate an issue worthy of review by this Court and the Court should reject the Petitioner's request.

The federal law claims in this case did not turn on any controversial legal points. The District Court noted that the Petitioner did not contend that the witness statements Officer Denbow had received, if believable, failed to provide probable cause for her arrest. The District Court concluded that Officer Denbow, having determined that probable cause existed, was not legally required to test the Petitioner's defenses before effecting her arrest. Finally, the District Court held that the Petitioner failed to generate an issue of fact on her claim for use of excessive force. In reaching that conclusion, the District Court noted that the Petitioner "barely pressed" her claim.

The First Circuit, through a panel of three judges, affirmed the District Court's Order based on the reasoning set forth by the District Court Judge. The Circuit Court panel did not deem it necessary to issue a separate opinion, nor did the Court as a whole find any basis for reviewing the panel's decision. While the Petitioner may

disagree with these rulings, she has not demonstrated a legitimate reason for the Supreme Court to invoke certiorari review.

STATEMENT OF THE CASE

The dispute in this lawsuit arises out of the Petitioner's warrantless arrest on July 30, 1997. In her response to the Windham Respondents' Statement of Material Facts in Support of Motion for Summary Judgment, the Petitioner admitted or failed to dispute Officer Denbow's knowledge of the following facts:[1]

At approximately 10:45 on the morning of July 30, 1997, Officer Denbow received a call from his dispatcher about an assault complaint. (Denbow Dep. at 14) (hereafter "D. at ___"). Officer Denbow proceeded to 287 Falmouth Road in Windham to investigate. (D. at 14-15).

Upon arriving, he spoke with the complainant, Defendant Jeanette Losciuto. (D. at 15). She informed him that she had witnessed the Petitioner "on top of Janelle (the Petitioner's daughter and Ms. Losciuto's granddaughter) hitting her in the head with her fists and hands and choking her." (D. at 17). She also provided Officer Denbow with background as to some irrational behavior

[1] The Petitioner's effort to generate an issue of fact in her Petition with regard to the information in Officer Denbow's possession at the time he ordered the Petitioner's arrest is unavailing. Facts deemed to be admitted as part of the summary judgment process control the record for the purposes of appeal. *See Betances v. Sea-Land Servs., Inc.*, 248 F.3d 40, 43-44 (1st Cir. 2001).

by the Petitioner that had occurred earlier that week during a trip to Virginia. (D. at 15-16). She stated that the Petitioner prevented Joseph (the Petitioner's son and Ms. Losciuto's grandson) from calling the police and that the Petitioner ordered her children to leave Ms. Losciuto's home or "they would get something worse when they got home." (D. at 17). As the children left Ms. Losciuto's house, the Petitioner told Ms. Losciuto not to call the children's father (Defendant Scott Losciuto) or the police or "she would leave the state with the two kids." (D. at 17).

Officer Denbow interviewed Ms. Losciuto for a considerable length of time. (D. at 17). She appeared to him to be a reliable witness. (D. at 17). She indicated that the Petitioner entrusted her to care for the children and that she did so approximately 90 percent of the time. (D. at 29).

Upon further inquiry, Ms. Losciuto explained that the Petitioner had acted irrationally in the past, including a situation where she threatened to leave the state "and send the kids back in pieces." (D. at 18). She also stated that the Petitioner had been treated for suicidal threats about ten years ago. (D. at 18).

Based on the information provided by Ms. Losciuto, Officer Denbow determined that the Petitioner should be arrested for assault. (D. at 18-19). He also concluded that there was a definite threat that further assaults would occur and that the Petitioner might leave the state with the children. (D. at 18). He advised his dispatcher to issue a lookout for the Petitioner's vehicle. (D. at 19).

Officer Denbow learned from dispatch that the Petitioner was currently speaking with Cumberland County Sheriff's deputies, including Defendant Deputy Joachim Schnupp. (D. at 20). Officer Denbow spoke to Deputy Schnupp by telephone and conveyed the information he had obtained from Ms. Losciuto. (D. at 26-27). He asked Deputy Schnupp to arrest the Petitioner on the charge of assault and transport her to the Windham Police Station. (D. at 27).

Officer Denbow met the Petitioner and Deputy Schnupp at the Station. (D. at 30-31). He observed that her hands were cuffed in front of her body. (D. at 30-31). She was escorted to the booking area, checked for weapons, and placed on a bench. (D. at 30-31).

From the time the Petitioner arrived at the Windham Police Department until the time she was released at Maine Medical Center, with two notable exceptions, the facts are largely undisputed:

Officer Denbow began processing the charge for booking, a task that was taken over by another officer when Scott Losciuto and the children arrived at the Station. (D. at 31-32). Officer Denbow spent approximately half an hour taking statements from the children before returning to the booking area. (D. at 35, 39).

The Petitioner was still on the bench when Officer Denbow returned. (D. at 39). Officer Denbow observed the Petitioner fall off the bench and on to the floor. (D. at 39). The Petitioner did not give any sign that she was about to pass out. (D. at 39). He called to the Petitioner but she did not respond. (D. at 40). Officer Denbow, who is trained as an emergency medical technician, took the

Petitioner's pulse and made observations about her skin and respiration. (D. at 40). Everything appeared normal. (D. at 40).

Officer Denbow called dispatch and requested a paramedic from the neighboring building. (D. at 41). At no time did Officer Denbow kick the Petitioner or otherwise touch her with his foot. (D. at 42).[2]

Doug Remington, the chief of Windham Rescue, responded to the call and examined the Petitioner. (Remington Aff. ¶2) (hereafter "R.A. ¶___"). Sheappeared to awake for Mr. Remington and informed him that she fainted due to low blood sugar. (R.A. ¶3). Mr. Remington tested her blood sugar level and it was within

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[2] This episode, along with the alleged viewing of the Petitioner in the bathroom at the hospital, represents the only notable factual difference the Petitioner identified as part of the summary judgment briefing. The Petitioner alleges that Officer Denbow kicked her in the leg when she "fainted" at the Station. (B. at 51-52). She states that she told Officer Denbow that she thought she was going to be sick and he responded by telling her the location of the bathroom. (B. at 49). She claims that after she vomited she continued to complain of dizziness and disorientation and suggested that she might be having a hypoglycemic reaction. (B. at 50). She states that she told the officers that she felt like she was going to pass out. (B. at 50). She claims that she did then pass out and that she was kicked by Officer Denbow as she lay on the floor. (B. at 51-52). She explains that her knowledge of being kicked is not impaired by her lack of consciousness because she was "coming in and out." (B. at 52). As the District Court properly concluded, any inconsistencies in these two versions of the facts were not material to resolution of the Petitioner's claims on summary judgment.

normal limits. (R.A. ¶4). He also tested her blood pressure and found it to be within normal limits with no suggestion of dehydration. (R.A. ¶5). The Petitioner made no complaint to Mr. Remington that her leg was injured or that she had been kicked. (R.A. ¶6). He indicated in his examination report that his diagnosis was: "behavioral." (R.A. ¶7). By that, he meant that the Petitioner's complaints were not substantiated by his examination. (R.A. ¶8).

Officer Denbow contacted the Petitioner's doctor, Dr. Schuler, to report her behavior. (D. at 44). Dr. Schuler indicated that he had already been contacted by the Petitioner's family about her erratic behavior. (Schuler Dep. at 53) (hereafter "S. at ___"); (D. at 46). Dr. Schuler recommended that the Petitioner be hospitalized. (S. at 56-61; D. at 46). He stated that he would call Maine Medical Center to arrange for an emergency psychiatric admission. (S. at 56-61; D. at 46). He asked Officer Denbow to transport the Petitioner to MMC for this admission. (S. at 60-61; D. at 46).[3]

Officer Denbow cuffed the Petitioner's hands in front of her body and drove her to MMC. (D. at 49, 50). He spoke with a triage nurse and informed her why he was there with the Petitioner. (D. at 52). The MMC staff acknowledged that Dr. Schuler had called concerning the

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[3] The Petitioner disclaimed any knowledge as to why Officer Denbow took her to MMC. (B. at 57).

Petitioner's admission. (D. at 52). He removed the Petitioner's handcuffs and left her with the admitting staff. (D. at 54, 57-58).[4]

The only treatment the Petitioner received with regard to an injury to her leg was a heating pad provided by MMC. (B. at 65). After the alleged incident she was evaluated twice – once by Mr. Remington and once by the staff at MMC. (B. at 52-53); (Pl. Int. Resp. ¶14 & Exh. A). She did not make any complaints of a leg injury to Mr. Remington. (R.A. ¶6). Subsequently, an MMC nurse examined the Petitioner's leg specifically to determine if she had sustained an injury as a result of the alleged kick and found none. (Pl. Int. Resp. ¶14 & Exh. A). Other than the alleged deep tissue leg bruise, the Petitioner does not claim that she was physically injured by Officer Denbow. (B. at 63).

Officer Denbow has been a police officer for 22½ years. (D. at 4). He is a graduate of the New Hampshire Criminal Justice Academy and is academy certified by the State of Maine. (D. at 11). During his employment for the Town of Windham he has continued to take numerous classes on the law, search and seizure, police involvement in crimes, crime scene investigations, field training officer and firearms instructor. (D. at 11). He also received training on how to effect arrests. (D. at 12).

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[4] *See supra* note 2. The Petitioner also suggests that she went to the bathroom at MMC and that Officer Denbow stood in the doorway of the bathroom while she was in there. (B. at 57-58). While Officer Denbow denies that this occurred, the District Court properly concluded that this dispute was not material for the purposes of summary judgment. (D. at 56).

There is no evidence in this case to suggest that the conduct alleged by the Petitioner occurred pursuant to a custom, policy or practice of the Town of Windham. (Pl's Int. Resp. ¶29). In her interrogatory answers, the Petitioner fails to identify any such information. (Pl's Int. Resp. ¶29).

REASONS FOR DENIAL OF THE WRIT

The Petitioner has not articulated a viable basis for review by this Court. She has not demonstrated any conflict between the holdings of this Court and the decision of the District Court, which was adopted by the First Circuit. Further, the District Court's application of Fourth Amendment precedent (as affirmed by the First Circuit) is entirely consistent with the approach taken by other Circuit Courts of Appeals. This Court should decline to issue a Writ.

I. THE FEDERAL COURTS HAVE CONSISTENTLY REJECTED THE NOTION THAT THE FOURTH AMENDMENT REQUIRES A LAW ENFORCEMENT OFFICER TO TEST THE VIABILITY OF A SUSPECT'S DEFENSES WHEN THE OFFICER HAS A REASONABLE BELIEF THAT A CRIME HAS OCCURRED OR IS OCCURRING.

Since at least 1970, when this Court decided *Chambers v. Maroney*, 399 U.S. 42 (1970), federal courts have consistently upheld probable cause determinations based on eyewitness reports. In *Chambers*, police officers stopped a vehicle and arrested its occupants based on a report by

eyewitnesses to a robbery. The Court did not pause in concluding that the officers had probable cause to effect the stop and arrest:

> We pass quickly the claim that the search of the automobile was the fruit of an unlawful arrest. Both the courts below thought the arresting officers had probable cause to make the arrest. We agree. Having talked to the teen-age observers and to the victim Kovacich, the police had ample cause to stop a light blue compact station wagon carrying four men and to arrest the occupants, one of whom was wearing a green sweater and one of whom had a trench coat with him in the car.

Id. at 46-47. The First Circuit has followed this construction of the Fourth Amendment's probable cause requirement. *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341, 351 (1st Cir. 1995). Other Circuit Courts are in accord. *See, e.g., Grimm v. Churchill*, 932 F.2d 674, 675 (7th Cir. 1991); *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264 (8th Cir. 1996); *J.B. v. Washington County*, 127 F.3d 919, 930 (10th Cir. 1997).

This application of the Fourth Amendment is hardly controversial. In reviewing an officer's probable cause determination, a court undertakes " 'an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time' and not [an assessment of] the officer's state of mind at the time the challenged action was taken." *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)). Probable cause will be found if "the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information

were sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense." *Rivera v. Murphy*, 979 F.2d 259, 263 (1st Cir. 1992) (quoting indirectly *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). As this Court has emphasized, probable cause exists as a matter of probabilities and not certainties. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983). Credible and material statements by an eyewitness are clearly sufficient to warrant a prudent officer to believe that an offense has probably occurred or is probably occurring.

While this Court has embraced the "totality-of-the-circumstances" approach to probable cause determinations, it has never wavered from the "practical, nontechnical conception" of probable cause. *Id.* at 230-31. *Gates* clarifies that probable cause is a "fluid concept" that relies in part on the experience and knowledge of the officer. *Id.* at 232 (citing *Adams v. Williams*, 407 U.S. 143, 147 (1972)). For example, the *Gates* Court suggested that an officer is entitled to weigh and consider witness information as the sole basis for probable cause: "if an unquestionably honest citizen comes forward with a report of criminal activity – which if fabricated would subject him to criminal liability – we have found rigorous scrutiny of the basis of his knowledge unnecessary." *Id.* at 233-34 (citing *Adams v. Williams*, 407 U.S. 143, 147 (1972)).

The Petitioner did not directly challenge below the sufficiency of the evidence Officer Denbow in fact possessed at the time he ordered her arrest. Apart from noting Ms. Losciuto's identity as a former mother-in-law, the Petitioner did not intimate any basis for questioning Ms. Losciuto's reliability. The Petitioner's concessions

with regard to the sufficiency of Officer Denbow's facts were noted by the District Court.

The Petitioner's stated objection – that Officer Denbow was required to test the Petitioner's defense or claim of innocence notwithstanding sufficient evidence to establish probable cause – is not supported by this Court's decisions or by decisions from the Circuit Courts of Appeals. *Chambers* does not intimate that such additional investigation is required and *Gates* supports Officer Denbow's reliance on a reliable eyewitness. Further, this Court expressly rejected an effort to impose such a requirement on officers executing an arrest warrant:

> Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim. The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury.

Baker v. McCollan, 443 U.S. 137, 145-46 (1979).

The First Circuit has held that the Fourth Amendment does not require police officers to investigate every possibility of innocence before effecting a warrantless arrest. *United States v. Bonilla Romero*, 836 F.2d 39, 46 (1st Cir. 1988). Rather, the First Circuit has emphasized that an arrest complies with the Fourth Amendment if "facts

and circumstances within [the arresting officer's] knowledge and of which [the officer] had reasonably trustworthy information . . . [is] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." (internal quotation marks omitted) (quoting *Draper v. United States*, 358 U.S. 307, 313 (1959); citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

Other Circuit Courts have taken an approach to the Fourth Amendment that is consistent with that taken by the First Circuit. For example, in *Ricciuti v. New York City Transit Authority*, 124 F.3d 123, 128 (2nd Cir. 1997), the United States Court of Appeals for the Second Circuit concluded that "[o]nce a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." (citing *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979)). Similarly, in *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264 (8th Cir. 1996), the United States Court of Appeals for the Eighth Circuit upheld the arrest of a suspect based on the eyewitness account of a 9-year old girl and rejected the suspect's argument that the arresting officers should have investigated his alibi: "The officers were not required to conduct a mini-trial before arresting Brodnicki." (citing *Morrison v. United States*, 491 F.2d 344, 346 (8th Cir. 1974)). *Accord Torchinsky v. Siwinski*, 942 F.2d 257, 264 (4th Cir. 1991) (holding that an officer is not required to "exhaust every potential exculpatory lead or resolve every doubt about a suspect's guilt before probable cause is established"); *Klein v. Long*, 2001 U.S. App. LEXIS 26990, *15

(6th Cir.) (holding that "once a police officer has sufficient probable cause to arrest, he need not investigate further"); *Ahlers v. Schebil*, 188 F.3d 365, 371 (6th Cir. 1999) (holding that "[o]nce probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused"); *Grimm v. Churchill*, 932 F.2d 674, 675 (7th Cir. 1991) (upholding probable cause determination based on eyewitness report and noting that complete investigation is not constitutionally required if probable cause exists); *J.B. v. Washington County*, 127 F.3d 919, 930 (10th Cir. 1997) (holding that deputy's assessment of witness's veracity was sufficient to support probable cause without further corroboration); *Rankin v. Evans*, 133 F.3d 1425, 1435-36 (11th Cir. 1998) (stating that an officer need not take "every conceivable step . . . at whatever cost, to eliminate the possibility of convicting an innocent person").

Since Officer Denbow had probable cause to support the Petitioner's arrest, and since there is no constitutional requirement that he investigate defenses once he has acquired probable cause, the Petitioner lacks viable grounds for review by this Court.

II. THE PETITIONER HAS NOT IDENTIFIED A BASIS FOR THIS COURT TO REVIEW THE LOWER COURTS' HOLDING WITH REGARD TO USE OF FORCE.

The Petitioner barely pressed the issue of use of force before the District Court and the First Circuit. Therefore, she has not properly reserved the issue for the purposes

of review by this Court. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, 494 U.S. 1082 (1990); *cf. Illinois v. Gates*, 462 U.S. 213, 217-18 (1983) (party must raise issue below to preserve it for appeal).

In any event, she has not presented a sufficient basis for review. The Petitioner did not develop an argument to suggest that the District Court or the First Circuit applied the wrong legal standard or a standard that conflicts with precedent from this Court or from other Circuit Courts. Rather, she appears to contend that the District Court and the First Circuit reached an incorrect result. In fact, the alleged conduct and the objective evidence do not support a claim based on use of excessive force. Of equal significance, this determination is more properly left to the First Circuit. There is no occasion for this Court to intercede. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

To the extent that the Petitioner meant to suggest that the District Court and the First Circuit failed to apply governing legal standards set forth in *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341 (1st Cir. 1995) and *Graham v. Connor*, 490 U.S. 386 (1989), her argument is groundless. Neither *Alexis* nor *Graham* stands for the proposition that a police officer's actions can be cumulatively evaluated for the purposes of the Fourth Amendment. *See also Jenness v. Nickerson*, 637 A.2d 1152, 1158 (Me. 1994) (applying federal case law) ("Because each individual action does not violate the constitution, the totality of those actions does not violate Petitioners' rights."). If anything, the *Graham* Court urged the lower

courts to be rigorous in identifying the specific conduct at issue so that the appropriate constitutional standard could be applied. *See Graham,* 490 U.S. at 393-94 ("In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force.") (citing *Baker v. McCollan,* 443 U.S. 137, 140 (1979)). Since the Petitioner has not demonstrated any reason to justify review, this Court should decline to consider the Petitioner's request.

III. FINDINGS OF FACT ARE NOT REQUIRED IN RULINGS ON MOTIONS FOR SUMMARY JUDGMENT.

Federal Rule of Civil Procedure 52(a) specifically states in relevant part that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56." Even if the Petitioner had properly preserved this issue, which she did not, the plain text of Rule 52 contradicts her entire argument.

IV. THERE WERE NO IRREGULARITIES IN THE PROCEDURES BELOW TO JUSTIFY REVIEW BY THIS COURT.

The Petitioner's omnibus argument concerning the treatment of this case below fails to generate an issue worthy of review by this Court. As discussed above, Federal Rule of Civil Procedure 52(a) does not require *any* findings of fact; therefore, the District Court's refusal to find certain facts cannot be erroneous.

The remaining examples of misconduct by the District Court relate to that body's alleged failure to follow governing precedent. As discussed above, to the extent the Petitioner preserved the issues by developing cogent arguments, the District Court applied the correct legal standards. The Petitioner's dissatisfaction with the result is no basis for review by this Court.

The Petitioner's complaints about the First Circuit's conduct do not merit a lengthy response. Suffice it to say the First Circuit had the authority to dispose of the case as it did, *see Lawton v. State Mut. Life Assurance Co.*, 101 F.3d 218, 220 (1st Cir. 1996), and the Petitioner did not present the Circuit Court judges sitting *en banc* with a viable reason to review the panel's determination.

CONCLUSION

For the reasons discussed above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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